93-544

No._____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1993

YOLANDA MOLINA de HERNANDEZ
PETITIONER,

v.

STATE OF ARIZONA
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

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Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

1. Whether due process and fundamental notions of justice and fair play require a post-seizure preliminary hearing, in cases involving seizure of property that is not a *malum in se*, to determine whether the allegations upon which the seizure is based require an *in rem* or *in personam* forfeiture proceeding as to each *res*.

2. Whether the "constructive fugitive disentitlement doctrine" should be applied to an *in rem* forfeiture claimant who is a foreign citizen who has not fled from the jurisdiction of a court within the United States, who resides in a country that has an extradition treaty with the United States, and who has never been subject to an extradition proceeding.

3. Whether property held either in joint tenancy with, or in trust by, a "constructive fugitive" may be forfeited without an opportunity for a hearing to determine innocent ownership of the joint tenant or trust beneficiary and whether failure to provide such a hearing results in an unconstitutional deprivation of property without due process.

LIST OF PARTIES

The parties that have appeared in this case, initially as claimants, are Yolanda Molina de Hernandez and Antonio Hernandez, husband and wife, and members of their family, including their four minor children, Jesus Daniel Hernandez, Jose Jerardo Hernandez, Marco Antonio Hernandez, and Cruz Estela Hernandez. As this is a State of Arizona initiated forfeiture action, the following real and personal property *inter alia* were originally designated as the primary named defendants:

Real Estate

1. Residence, 934 Sixth Street, Douglas, Arizona
2. Residence, 2100 Eighth Street, Douglas, Arizona
3. NW Quarter of Section 18, Township 24, Range 26 East of Gila and Salt River Base and Meridian, Cochise County, Arizona
4. SW Quarter of Section 13, Township 24 South, Range 25 East of the Gila and Salt River Base and Meridian, Cochise County, Arizona
5. S Half and NW Quarter of Section 18, Township 24 South, Range 26 East of the Gila and Salt River Base and Meridian, Cochise County, Arizona
6. NE Quarter, E Half of NW Quarter, and NE Quarter of the SW Quarter of Section 13, Township 24 South, Range 25 East of the Gila and Salt River Base and Meridian, Cochise County, Arizona
7. S Half of the S Half of Section 7, SE Quarter, and the SE Quarter of the SW Quarter of Section 8, and the N Half of Section 17, all in Township 24 South, Range 26 East of the Gila and Salt River Base and Meridian, Cochise County, Arizona
8. NE Quarter of the SW Quarter and the SW Quarter of the SW Quarter of Section 8, Township 24, Range 26 East of the Gila and Salt River Base and Meridian, Cochise County, Arizona

Bank Accounts

Arizona Bank (002903016) $13.99 (Virginia Molina in trust for Graciela Molina)
Arizona Bank (002707309) $106,621.90 (Yolanda Molina or Virginia Molina)
First Interstate Bank (943-21398) $114,524.09 (Yolanda Molina Hernandez)
First Interstate Bank (943-21398) $100,000.00 (Yolanda Molina Hernandez)
First Interstate Bank (944-21425) $100,879.35 (Yolanda Molina Hernandez)
First Interstate Bank (946-21424) $101,454.77 (Yolanda Molina and Marco Antonio Hernandez)
First Interstate Bank (947-21429) $100,603.45 (Yolanda Molina and Cruz Estela Hernandez)
First Interstate Bank (948-21423) $109,335.28 (Yolanda Molina and Jesus Daniel Hernandez)
First Interstate Bank (947-01659) $10,375.31 (Yolanda Molina Hernandez)
First Interstate Bank (946-07845) $15,575.45 (Benjamin O. Loreto)
Valley National Bank (2644-5921) $0.91 (Yolanda Molina de Hernandez and Jose Luis Molina)
Valley National Bank (3336-5487) $25,066.29 (Yolanda Molina de Hernandez)
Valley National Bank (2648-8235) $1,136.68 (Benjamin Loreto-Ortiz)
Valley National Bank (3976-0226) $30,747.71 (Yolanda Molina Hernandez for Jose Jerardo H. Molina or Marco Antonio H. Molina)
Valley National Bank (943-89176) (Yolanda Molina for Jesus Daniel Hernandez)
Valley National Bank (948-2142) (Yolanda Molina Hernandez for Jesus Daniel Hernandez)
Valley National Bank (8236-7286) $141,876.22 (Yolanda Molina Hernandez)
Valley National Bank (8236-7411) $148,196.82 (Yolanda Molina Hernandez)
Valley National Bank (8236-7446) $146,735.68 (Yolanda Molina Hernandez)

Valley National Bank (8236-7593) $142,425.64 (Yolanda Molina Hernandez)
Valley National Bank (8765-6116) $13,800.73 (Yolanda Molina Hernandez)
Valley National Bank (8236-8414) $131,095.70 (Name Undesignated)
Valley National Bank (8671-4759) $132,201.38 (Jesus Hernandez-Flores)

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The Memorandum Decision of the Arizona Court of Appeals is not reported (Appendix A). Prior to the appellate court ruling, the Arizona Supreme Court granted petitioners' Motion for Transfer and remanded the case.

JURISDICTION

On March 9, 1993 the Arizona Court of Appeals affirmed the lower court's Order of Forfeiture. On July 9, 1993 the Supreme Court of the State of Arizona denied petitioners' Petition for Review. This Petition for Writ of Certiorari was filed within ninety days of the date of the denial by the Arizona Supreme Court. This Honorable Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. Sec. 1257(a) and Rule 10(b) and (c) of its Rules.

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED IN THIS CASE

Constitution of the United States, Amendment 14, Section 1:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Arizona Revised Statutes Annotated, Title 13, Chapter 39:

Sec. 13-4301. Definitions

In this chapter, unless the context otherwise requires:

. . . .

2. "Interest holder" means a person in whose favor there is a security interest or who is the beneficiary of a perfected encumbrance pertaining to an interest in property.

3. "Owner" means a person who is not a secured party within the meaning of Sec. 47-9105 and who has an interest in property, whether legal or equitable. A purported interest which is not in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against

a bona fide purchaser for value shall not be recognized as an interest against this state in an action pursuant to this chapter. An owner with power to convey property binds other owners, and a spouse binds his spouse, by his act or omission.

Sec. 13-4304. Property subject to forfeiture; exemptions.

All property, including all interests in such property, described in a statute providing for its forfeiture is subject to forfeiture, except that:

. . . .

3. No owner's or interest holder's interest may be forfeited under this chapter if the owner or interest holder establishes all of the following:

(a) He acquired the interest before or during the conduct giving rise to forfeiture.

(b) He did not empower any person whose act or omission gives rise to forfeiture with legal or equitable power to convey the interest, as to a bona fide purchaser for value, and he was not married to any such person or if married to such person, held the property as separate property.

(c) He did not know and could not reasonably have known of the act or omission or that it was likely to occur.

4. No owner's or interest holder's interest may be forfeited under this chapter if the owner or interest holder establishes all of the following:

(a) He acquired the interest after the conduct giving rise to forfeiture.

(b) He is a bona fide purchaser for value not knowingly taking part in an illegal transaction.

(c) He was at the time of purchase and at all times after the purchase and before the filing of a racketeering lien notice or the provision of notice of pending forfeiture or the filing and notice of a civil or criminal proceeding under this title relating to the property, whichever is earlier, reasonably without notice of the act or omission giving rise to forfeiture and reasonably without cause to believe that the property was subject to forfeiture.

Arizona Revised Statutes Annotated, Title 13, Chapter 23

Sec. 13-2314 Racketeering; civil remedies; definitions.

. . .

F. In addition to or in lieu of an action under this section the state may file an action pursuant to chapter 39 of this title for forfeiture, to the extent not already ordered paid pursuant to this section, of:

1. Any interest acquired or maintained by a person in violation of Sec. 13-2312.

2. Any interest in, security of, claims against or property, office, title, license or contractual right of any kind affording a source of influence over any enterprise or other property which a person has acquired or maintained an interest in or control of, conducted or participated in the conduct of in violation of Sec. 13-2312.

3. All proceeds traceable to an offense included in the definition of racketeering in Sec. 13-2301, subsection D, paragraph 4 and all monies, negotiable instruments, securities, property and other things of value used or intended to be used in any manner or part to facilitate the commission of the offense.

U.S./Mexico Extradition Treaty (May 4, 1978), Article 9

Extradition of Nationals

1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

STATEMENT OF THE CASE

1. Proceedings In The Arizona State Courts.

In January, 1989 the defendant assets, most of which are listed above, were seized in Cochise County, Arizona pursuant to a seizure warrant whose probable cause was grounded in an affidavit alleging that Yolanda Molina de Hernandez and her husband were a part of a "Mexican Cocaine Cartel," along with six other prosperous families who own ranches "covering most of the U.S. Mexican border between San Luis, Arizona and El Paso, Texas." On March 31, 1989 the State of Arizona commenced a civil *in rem* forfeiture action brought pursuant to the Arizona Racketeering Act (A.R.S. Sec. 13-2301 *et seq.*), alleging that the seized assets were the proceeds of an illegal narcotics importation enterprise carried out by "members" of the enterprise.

Within the time required by law, Yolanda Molina de Hernandez, her husband, and children ("Molina"), among others, filed claims for return of the seized property. Thereafter Molina moved for a more definite statement, arguing that since the seized property would be "guilty" only by virtue of the guilty conduct of its owners, it can only be forfeited by proving allegations against specific individuals. Molina also moved to dismiss the action on the constitutional grounds that an *in rem* forfeiture proceeding, given the allegations contained in the affidavit and complaint, violated due process. In response to the motion to dismiss, the State argued: "*In rem* forfeiture does not focus on retribution. It applies to property, not to people. No person is accused of wrongdoing, no process is issued to compel any accused's attendance, and a potential claimant has the option of simply not filing a claim." Both motions were denied.

When the State served extensive interrogatories, requests for production of detailed financial statements, requests for handwriting exemplars, and for admissions to the commission of numerous acts of crime, Molina objected and moved for a stay of the *in rem* proceeding until criminal charges were directly brought and proven. Again, the State replied: "There is no necessary connection between the forfeiture of the proceeds of racketeering and any allegation of wrongdoing by a claimant." The stay motion

was denied.

On October 24, 1989 the State noticed Yolanda Molina for deposition at the office of the Cochise County Attorney, and she moved for a protective order on the grounds that there were rumors of a secret indictment against her. The State opposed the motion by contending that by her failure to enter the United States for a deposition Yolanda Molina was a fugitive and was not entitled to "selectively submit to the jurisdiction of the Arizona civil courts." However, the motion was granted.

On December 28, 1989 a secret indictment was returned charging Yolanda Molina and her husband with importation of, conspiracy to import, and purchase of property to facilitate importation of marijuana into the United States. Each six months thereafter the Cochise County prosecutor moved to continue the arraignment and maintain the warrants in full effect. Meanwhile, Yolanda Molina and her husband and children continued to live openly in Agua Prieta, Mexico, within a few minutes walking distance from the Port of Entry at Douglas, Arizona, their children crossing daily to attend schools in the United States. No attempt to extradite the parents has been made.

Thereafter, the State filed a "Motion for Summary Judgment As To The Claim of Yolanda Molina." The motion was based entirely upon the fugitive disentitlement doctrine ("The only factual issue that this Court must reach in order to dismiss the claim is whether Claimant is a fugitive.") The State also argued that the property of the Molina minor children was forfeitable as a matter of law under the "relation back" doctrine and the definition of an "owner" in A.R.S. Sec. 13-4301(3). Yolanda Molina responded *inter alia* that as a Mexican national who did not flee into Mexico she could not be deemed a fugitive unless and until an attempt was made to extradite her and she resisted. The court granted the motion for summary judgment, finding that Yolanda Molina was a "constructive fugitive" and that the minor children did not have assertable ownership interest, by statute, in the bank accounts containing their names as joint tenants or beneficiaries, or in the real property held in their name alone as it was property paid for with the proceeds of racketeering.

Based upon the summary judgment the Order of Forfeiture was entered on April 26, 1991. Appeal to the Arizona Court of Appeals was timely made. The State asked that a bond of $400,000.00 be set. Molina argued that a cost bond was sufficient insofar as the State already had possession of the seized assets. The court set a bond of $500.00 and ruled that the proceeds of the bank accounts, $1,791,131.51, had been disbursed and were therefore beyond its jurisdiction.

Among the issues raised and argued by Molina on appeal to the state appellate court were: (1) whether their due process rights were violated by the use of an *in rem* proceeding predicated solely upon allegations of personal criminal conduct and whether the fugitive disentitlement doctrine should have a "constructive" application to foreign nationals who do not engage in physical flight out of the United States.

The State moved to dismiss the appeal for the reason that the lower court no longer had jurisdiction over the *res*. Molina opposed the motion on the grounds that the appellate court retained jurisdiction over the entire *res* since it retained jurisdiction over the unsold land and since forfeiture actions, being *quasi in rem* actions, did not require actual possession and control of the *res* by the court as a basis for jurisdiction once the parties were before it. However, the appellate court granted the motion, denied Molina's motion for reconsideration, and dismissed the appeal.

In June 1992, Molina petitioned the Supreme Court of Arizona to review the appellate court dismissal and to transfer the appeal to that court. Besides the aforementioned issues sought to be reviewed, the petition sought review on the issue of *in rem* jurisdiction, viz., whether removal of the *res* divests the court of jurisdiction. The State filed a cross-motion to dismiss and response to the petition for review.

On January 25, 1993 the Arizona Supreme Court granted Molina's petition for review and for transfer and remanded the case to the appellate court in light of the United States Supreme Court opinion in *Republic National Bank of Miami v. United States*, 53 CC S.Ct. Bull. p. B397. On March 9, 1993 the Arizona

Court of Appeals affirmed the trial court's ruling and determined that the fugitive disentitlement doctrine warranted a dismissal of Yolanda Molina's claims and that the property in the name of her minor children could be forfeited pursuant to A.R.S. Sec. 13-4301(3). In April, 1993 Molina filed a second petition for review to the Arizona Supreme Court, which was denied on July 9, 1993.

2. Where The Issues Raised In This Writ Were Raised Below And Why This Honorable Court Should Review Them.

At the outset of this case Molina moved for a stay of the *in rem* proceedings on the grounds that the allegations of the affidavit upon which the seizure warrant was based asserted acts of criminal conduct and that Arizona law governing *in personam* forfeitures should apply. This same issue was raised again twice before the Court of Appeals and twice before the Arizona Supreme Court.

Molina's disentitlement argument was raised in the response to the State's motion for summary judgment and again twice in the Court of Appeals and Supreme Court. The same is true for the argument regarding the derivative claims of the minor children.

In its summary judgment ruling the trial court based its decision entirely on *United States v. Catino*, 735 F.2d 718 (2nd Cir. 1984) and on *Molinaro v. New Jersey*, 396 U.S. 365 (1970). In its ruling affirming the trial court's decision, the Court of Appeals based its ruling on *United States v. One Parcel of Real Estate, Dade County, Florida*, 868 F.2d 1214 (11th Cir. 1989), and other federal cases. (Appendix A). The vast majority of issues, and certainly all dispositive issues, raised by all parties below involved federal decisional law. In addition, Molina raised claims based on privileges protected by the United States/Mexico Extradition Treaty and by the United States Constitution. No independent and adequate state grounds exist for the decisions of the Arizona state courts.

REASONS FOR GRANTING THE WRIT

THIS CASE INVOLVES IMPORTANT FEDERAL QUESTIONS AND PROVIDES THE COURT WITH AN OPPORTUNITY TO CREATE A COMPREHENSIVE PROCEDURAL TOOL IN FORFEITURE ACTIONS THAT WILL RESOLVE MANY OF THE AD HOC ISSUES PERSISTENTLY BEING RAISED ON APPEAL IN STATE AND FEDERAL COURTS.

1. Due Process Requires a Post-Seizure Omnibus Hearing To Determine Whether the Forfeiture Action Should Proceed *In Rem* Or *In Personam* And To Resolve Other Pre-Trial Issues Necessary For a Just Adjudication.

With increasing economic integration of the United States and Mexico citizens on either side of the border should not be declared "constructive fugitives" merely because they seek the protections they are entitled to by treaty. No United States citizen would venture into Mexico to retrieve his or her property if to do so meant that they would have to submit to the jurisdiction of the Mexican courts to answer criminal charges. However, where formal extradition proceedings are utilized both countries work together to accomplish common goals and the perception of lawfulness is maintained. In the present case the Molina family live openly directly adjacent to the U.S. border. The children, some of whom are U.S. citizens, travel daily to their school on the north side of the border. Family members are routinely seen by federal customs and border patrol agents. For many years the Molina family deposited money into bank accounts in Douglas, Arizona. In response to the State's motion for summary judgment they provided voluminous documents reflecting cattle ranching transactions to raise a question of material fact about the legitimacy of the source of their income. However, even though the State had argued that the particular conduct of an *in rem* forfeiture claimant is irrelevant to the issues to be litigated, paradoxically that claimant's mere absence turned out to be fully dispositive of the case. Molina was left with the prospect of having the burden to prove the existence of a legitimate foreign business enterprise against the sworn statement of the seizure

warrant affiant that, based on his extensive experience, most foreign narcotics traffickers masquerade as cattle barons. Under such circumstances the trial court would be constrained to select the government's view only if the claimant could show the virtual impossibility of the governments allegations. In such instances the weighing of evidence would be virtually standardless. *United States v. All Funds on Deposit*, 801 F.Supp. 984, 991 (E.D.N.Y. 1992) ("The structure of this kind of case is *inherently unfair* to claimants which must prove their money is legitimate after the funds have already been seized by the government. The government needs only to show probable cause to seize. The difficulty in proving in an American court the legitimate origins of particular assets from abroad is pronounced." Emphasis added). As the record below reflects, when Molina submitted cattle documentation prior to summary judgment, the state's response was that everybody knows that Mexican government documents are notoriously fraudulent.

Molina argued in the State courts that the discretion of the State to decide the form of a forfeiture proceeding regardless of the manner in which the *res* is guilty, conflicts with the constitutional requirement that the process due must be determined by the facts and circumstances of each case. Application *a priori* of the rigid *in rem/in personam* distinction may lead to a harsh, unfair result which could be significantly avoided by the imposition of a post-seizure omnibus hearing to establish the parameters of the subsequent litigation. At such a hearing, the court would analyze the *res* and the seizure affidavit to determine, first, whether some or all of the *res* may be continued to be utilized by the claimant, (land, residences, businesses), and under what circumstances (bond, receiver, lis pendens, etc.) and, second, whether some of the *res* is "guilty' due to inherent characteristics (controlled substances, counterfeit currency, illegal fire arms, etc.), due to close physical proximity or nexus with inherently guilty *res*, or derivatively due to illegal conduct (cash proceeds and assets purchased with cash proceeds). The omnibus hearing would establish which *res* would be subject to *in rem* proceedings, and which to *in personam*. In other words, the court, not the government, would select the process that is due, with its differing burdens and procedural safeguards depending on the facts of the case before it. The court would also determine issues of standing and the availability of various

statutory defenses. The test for such considerations would be whether a given ruling satisfies established notions of due process. In *United States v. Seifuddin*, 820 F.2d 1074 (9th Cir. 1987) the court noted that "the Supreme Court . . . has never developed a principled explanation of the distinction between civil and criminal forfeiture." *Id.*, at 1076. However, the answer is not a bright line, abstract test for all situations, but an approach that does away with the rigid *in rem/in personam* basis for jurisdiction, and with it abstract distinctions like remedial/punitive rationales for forfeiture that were created after the fact, in favor of a flexible approach that suits the procedure to the underlying facts, as occurs otherwise typically in courts of law in other proceedings.

Previously, this Court left open the question whether an order restricting disposition of seized property in order to retain counsel required an adversarial hearing. *United States v. Monsanto*, 491 U.S. 600 (1989). The Court of Appeals for the Second Circuit concluded that such an adversarial hearing was necessary in light of the due process requirements set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), *United States v. Monsanto*, 924 F.2d 1186 (2nd Cir. 1991), since a considerable risk of deprivation of rights exists if the government is allowed to obtain an ex parte restraining order to freeze assets to be used to retain counsel without an opportunity to respond:

> In the case before us, where the property is real estate rather than obvious contraband the only source of certainty that the property is probably the proceeds of criminal activity is the indictment itself . . . . It follows that there is a substantial risk of an erroneous deprivation of a defendant's significant property interest in the absence of an opportunity to be heard after the ex parte entry of a restraining order under section 853(e)(1)(A) [18 U.S.C. Sec. 853(e)(1)(A)]

Id., at 1195. The Second Circuit saw "considerable worth" in a post-seizure, pre-trial hearing to determine whether any interim deprivation of use of property will have "an appropriate factual foundation." *Id.* The Second Circuit also believed that such a hearing should consider whether there was probable cause to

forfeit and rejected the government's response that only the traceability of the proceeds and not the underlying offense should be subject to a probable cause hearing: "It would be anomalous to authorize the hearing that the government concedes to be required by due process, but circumscribe the inquiry therein so as to preclude any consideration of the offense that is central to the availability of forfeiture." *Id.*, at 1197. If a hearing is required to establish likely outcomes where procedures impact upon Fifth and Sixth Amendment rights in a criminal *in personam* forfeiture proceeding, *a fortiori* such a hearing should be required to consider the threshold issue of what kind of proof should be required and what kind of facts must be proven; in other words, whether the appropriate factual foundation of the action requires an *in rem* or *in personam* proceeding to establish what sort of quality or nexus creates the guilt of the *res*. For example, in *United States v. $31,990 In U.S. Currency*, 982 F.2d 851 (2nd. Cir 1993) the court looked for a substantial connection between the cash proceeds seized and the exchange of a controlled substance and, finding that large amounts of cash and the method of its bundling might support an inference of illegal activity but not of drug-related illegal activity, the court affirmed the lower court's dismissal of the forfeiture action. An omnibus hearing would give both the claimant and the government an opportunity to state its best legal claims as to each of the *res* with particularity and, thereby, to shift review of many of the issues now considered by the appellate courts to the trial court.

As current precedent, Molina urges this Court to adopt and expand the Second Circuit's approach to forfeitures generally, and refers the Court to a following remark in a seminal case resurrected after many years and cited often in recent forfeiture litigation, *The Rio Grande*, 90 U.S. 458 (1874):

> The vessel was in possession of the court when suit was commenced. It was the duty of the court to decide whether the proceeding should be *in rem* or *in personam*, and until reversal, its decree on this question is conclusive.

Id., at 466. *See also United States v. Halper*, 490 U.S. 435 (1989) (substance of proceeding, not labels "civil" or "criminal" determine

whether federal constitutional protections are implicated.) and *Republic National Bank of Miami, supra*, 53 CCH S.Ct Bull at p. B403 ("The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts and to furnish remedies for aggrieved parties . . . not to provide a prevailing party with a means of defeating its adversary's claim for redress.")

Federal courts have continued to struggle with and seek to overcome the limitations placed upon their discretion by the label of the proceeding in order to get to the merits and measure them against constitutional standards. *United States v. All Assets of Statewide Auto Parts Inc.*, 971 F.2d 896, 905 (2nd Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.), *United States v. One 1987 BMW 325*, 985 F.2d 655, 658 (1st Cir. 1993) ("We are mindful, too, that forfeiture is a harsh medium and that disposition-on-the-merits policy is, therefore, particularly potent here."), *United States v. One Parcel of Property*, 964 F.2d 814 (8th Cir. 1992) (finding it "incongruous" to require proportionality in *personam*, but not *in rem* forfeitures), *United States v. $12,390.00*, 956 F.2d 801, 811 (8th Cir. 1992) (Beam, C.J. dissenting) ("Additionally, although civil forfeitures are punitive in nature and have all the stigma associated with punitive proceedings, many of the constitutional protections found in such proceedings are notably absent. The lack of these protections creates a situation where government deprivation of property is too easily accomplished. *This situation demands that more process be incorporated into forfeiture proceedings involving noncontraband property.*" Emphasis added.) *See also* Virginia A. Albers, *Is Greater Due Process Due?: United States v. Twelve Thousand, Three Hundred and Ninety Dollars ($12,390)*, 26 Creighton L. Rev. 841 (1993) (analyzing Judge Beam's suggestion of reallocating the burden of proof as in employment discrimination cases), and George C. Pratt and William B. Petersen, *Civil Forfeiture in the Second Circuit*, 65 St. John's L. Rev. 653 (1991) (This article by Judge Pratt, Court of Appeals for the Second Circuit, and his law clerk chronicles the constitutional abuses resulting from "indiscriminate use of unexamined legal fictions.") As Arizona's forfeiture statutes are written an *in rem* action may be used to forfeit proceeds exclusively traceable to a racketeering offense,

without the necessity of proving the underlying offense or a nexus to contraband, and by a procedure that, in many circumstances, places a nearly impossible burden upon the claimant. A.R.S. Sec. 13-2314(F). The State argued that A.R.S. Sec. 13-2314(F) establishes an automatic nexus for *in rem* racketeering proceeds cases because it *defines* the nexus as the illegal conduct itself. As argued above, if the nexus is guilty conduct then the dispositive issue for the trial court to decide is not whether the proceeds have a legitimate source, but whether the unlawful conduct alleged in fact occurred, and in that case the proceeding always should be an *in personam* one for such cases.

2. *In Rem* Fugitive Disentitlement Violates Due Process.

There is something inherently unfair about the application of the fugitive disentitlement doctrine to an *in rem* forfeiture proceeding in general, but particularly to a proceeding which is *in rem* in form, but *in personam* in substance. Used in such a circumstance, traditional disentitlement doctrine, as enunciated in *Molinaro v. New Jersey, supra, Conforte v. Commissioner of Internal Revenue*, 692 F.2d 587 (9th Cir. 1982), and *United States v. $129,374 in U.S. Currency*, 769 F.2d 583 (9th Cir. 1985), has drifted far from its original moorings, since literally the very nature of the claims asserted in a true *in rem* proceeding may be adjudicated without the presence or participation of the claimant personally in the courtroom. When a claimant dies, for example, the estate is not disentitled. The application of the disentitlement doctrine to *in rem* forfeitures really amounts to no more than an extension of punishment for crimes that may not be otherwise provable. In fact, Arizona law does not require the presence of the claimant: "At the hearing, the claimant may testify, present evidence and witnesses on his own behalf and cross-examine witnesses who appear at the hearing." A.R.S. Sec. 13-4311(J). If he is not required to attend in the first place, why does his fugitive status make a difference? It should not.

Molina urged upon the Arizona higher courts the functional, as opposed to status, treatment of disentitlement more recently found in *Katz v. United States*, 920 F2d. 610 (9th Cir. 1990), *Perko v. Bowers*, 945 F.2d 1041 (8th Cir. 1991), *United*

States v. Van Cauwenberghe, 934 F.2d 1048 (9th Cir. 1991), *United States v. Boyd*, 958 F.2d 247 (8th Cir. 1992) and *Ortega-Rodriquez v. United States*, 53 CC S.Ct Bull. p. 1258 which analyze the relationship between the "fugitive" and the nature of the judicial proceeding applying the sanction before applying the sanction itself. Application of disentitlement in any *in rem* proceeding, but certainly one involving the legal fiction of "constructive flight," is so clearly a rule that 'sweeps far too broadly', *Ortega-Rodriquez*, 53 CC S.Ct. Bull at B1271-B1272, as to violate the due process clauses of the Fifth and Fourteenth Amendments. *Mathews v. Eldridge*, *supra*. The risk of erroneous deprivation is not only high, but certain, when disentitlement occurs in the manner in which it has occurred in this case.

Molina also argued in the State courts that the extradition treaty between the United States and Mexico signed in Mexico City on May 4, 1978 creates a right to be free from disentitlement until such time as she becomes a fugitive in her own country pursuant to an extradition attempt or until such time as a Mexican court establishes the corresponding predicate of the "dual criminality" requirement for extradition and she actively resists extradition. If neither of those events occur one party to the treaty should not be free to declare a citizen of the other party a "fugitive" to suit its own purposes. Article 9 of the Treaty makes extradition discretionary, but at least requires prosecution by the requested state. Since the entire forfeiture in this case was predicated upon, and only upon, allegations of a criminal enterprise, a foreign citizen accused of such crimes would reasonably expect to be covered by the substantive and procedural protections of the treaty. Those protections should not be considered waived by the filing of a claim for return of seized property in a proceeding that is initiated by the government. *United States v. Sharpe*, 470 U.S. 675 (1985) (restricting the "equitable principle" of fugitive disentitlement in *Molinaro*, *supra*, to fugitive initiated suits).

The lower court disentitled Yolanda Molina because she would not attend a deposition in the United States or to answer to criminal charges. Under Arizona law she was entitled to be deposed at her place of residence in Mexico, which is thirty minutes drive from the courthouse in Bisbee, Arizona. Failure to

attend a deposition beyond one's place of residence does not amount to "flouting." *All Funds on Deposit,* 801 F. Supp. at 999. ("Nor is there any evidence to suggest that Daccarett is flouting the judicial system in this forfeiture case. On the contrary, the attorney for claimants Manufacturas J.D. and Organization J.D. asserts that Daccarett has been willing to be deposed in person at an embassy in Columbia or by telephone but the government has refused."). Analogously, if the government refuses to make the effort to seek extradition for the criminal charges, absence should not be construed as "flouting" either.

In addition, public policy dictates that all international procedures be utilized before forfeiture occurs. Indiscriminate confiscation of businesses and property situated in Mexico but owned by U.S. citizens could occur were Mexican authorities able to condition confiscation upon failure to personally answer to criminal charges in that country. It is doubtful that the officers of a U.S corporation operating in Mexico would be willing to risk incarceration to personally defend allegations that their auto assembly plant facilitated the distribution of illegal drugs or polluted the local river, without intervention of U.S. authorities, pursuant to an extradition treaty, to review and negotiate the charges and penalties.

3. The Minor Children Should Not Be Disentitled Due To The Alleged Fugitive Status Of Their Mother.

The Arizona Appellate Court determined that the Molina family members were bound by the actions of their mother, Yolanda Molina, (Appendix A), pursuant to A.R.S. Sec. 13-4301(3), which defines an "owner" in pertinent part as:

> a person who is not a secured party within the meaning of Sec. 47-9105 and who has an interest in property, whether legal or equitable. A purported interest which is not in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against a bona fide purchaser for value shall not be recognized as an interest against the state in an

> action pursuant to this chapter. An owner with power to convey property binds other owners, and a spouse binds his spouse, by his act or omission.

Arizona's forfeiture statutes have an general innocent owner defense provision. A.R.S. Sec. 13-4304(3). However, the effect of the above provision is to restrict *a priori* the class of "owners" who are permitted to assert the defense. Joint tenants are not "owners." Presumably, a spouse is not an "owner" no matter what his or her ownership interest is or how it is secured or manifested. In effect, Arizona's definition of an "owner" creates by statute a guilt by association for certain kinds of ownership, regardless of the underlying facts or merits of the relationship, and since it is extremely likely that the defense would be raised in the cases involving a *res* that is not a *malum in se*, like homes, vehicles, bank accounts, where forfeitability often depends, as in the instant case, only on ownership, it simply begs the question of the forfeiture proceeding to say that the government "owned" the property from the outset, as against any assertable interest of a joint tenant, partner, spouse, or donee. Even without the use of fugitive disentitlement the risk of potential erroneous deprivation to such third parties is absolute, since their status determines by law whether or not they will be heard in the first place. This Court has expressed sound reservations of the use of the common-law doctrine of relation back to foreclose an opportunity to put on a defense of innocent ownership. *United State v. A Parcel of Land, Building, Appurtenances, and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, et. al.*, 53 CC S.Ct. Bull. p. B1105. Arizona has a specific relation back statute. A.R.S. Sec. 13-4310(F) and explicitly excludes donees from an exemption in proceeds cases reserved only for bone fide purchasers for value. A.R.S. Sec. 13-4304(4). As against the Court's concerns in *92 Buena Vista, supra* the State called Arizona's statutes "crystal clear" and problem free. However, in limiting a defensible ownership interest only to that which advances commercial goals in general the Arizona forfeiture statutes may violate due process of particular individuals. Due process requires that this Court's reservations apply not only to donees, but to disentitled joint tenants, trust beneficiaries, and to all those who are not merely "owners" under A.R.S. Sec. 13-4301(3).

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment of the Arizona Court of Appeals.

Respectfully Submitted,

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN THE MATTER OF:)	CA-CV 91-0250
)	DEPARTMENT A
THE PROCEEDS OF)	MEMORANDUM DECISION
TWENTY-THREE)	Not For Publication
ACCOUNTS, ET AL.)	Rule 28(a)(2)
)	Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT
OF COCHISE COUNTY

Honorable Matthew W. Borowiec, Judge

AFFIRMED

Joseph L. Esposito — Tucson

Attorney for Plaintiffs/Appellants

Grant Woods, The Attorney General
by Cameron H. Holmes — Phoenix

and

Alan K. Polley, Cochise County Attorney
by Marvin Wolin — Bisbee

Attorneys for Defendant/Appellee

L I V E R M O R E, Chief Judge.

Appellant Yolanda Molina Hernandez filed a claim in a forfeiture action which ultimately resulted in the forfeiture of cash and property valued in excess of two million dollars. Forfeiture was sought on the ground that the property was the proceeds of marijuana importation and money laundering ventures. Appellant was subsequently indicted on such charges. When she neither appeared on those charges nor appeared for a deposition in the forfeiture proceeding, her claim in the latter proceedings was rejected under the fugitive disentitlement doctrine. We agree with that ruling and affirm.

In United States v. One Parcel of Real Estate, Dade County, Florida, 868 F.2d 1214 (11th Cir. 1989), the court held that a Colombian citizen who filed a claim in a forfeiture proceeding but did not return to the United States to face related criminal charges was disentitled as a fugitive to call on the resources of the court to determine his claim in the forfeiture proceeding. Accord United States v. Eng, 951 F.2d 461 (2nd Cir. 1991); United States v. $129,374 in United States Currency, 769 F.2d 583 (9th cir. 1985); United States v. $45,940 in United States Currency, 739 F.2d 792 (2nd Cir. 1984). Those facts are indistinguishable from the facts in the present case and the result, dismissal of appellant's claim, must stand. We need not, therefore, address any issue raised by appellant.[1]

Affirmed.

(Copy signed by Judge Livermore)

JOSEPH M. LIVERMORE, Chief Judge

[1]Certain forfeited bank accounts and other property were in the name of appellant and her minor children, also appellants. Because the children were not fugitives, their claims ordinarily could be asserted in spite of the fugitive disentitlement doctrine. But they have no claim because they are bound by their mother's actions. A.R.S. Sec. 13-4301(3).

CONCURRING:

(Copy signed by Judge Fernandez)

LLOYD FERNANDEZ, Judge

(Copy signed by Judge Espinosa)

PHILIP G. ESPINOSA, Judge